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Supreme Court of the United States

October Term, 1940

No. 911

ROBERT J. NEWMAN AND NORVIN T. HARRIS, JR.,
Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Judgment Sought to be Reviewed

Robert J. Newman and Norvin T. Harris, Jr., by their solicitors, respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered on January 18, 1941 (8 R. 4823), rehearing denied March 3, 1941 (8 R. 4860), affirming judgments of the District Court for the Eastern District of Louisiana, New Orleans Division, entered on January 2, 1940 (1 R. 457-60), which sentence the petitioners upon a verdict returned by a jury on December 22, 1939 (1 R. 376-7).

The indictment (1 R. 103-30) in eight counts differing only in the "mailings" specified, charged the petitioners and three others—Shushan, Miller and Waguespack—with violation of the Federal mail fraud statute (Criminal Code, § 215, 18 U. S. C., § 338). All the defendants were jointly tried (but were represented by separate counsel). A verdict was returned, as to all, of not guilty under one count of the indictment, and guilty under the remaining seven counts (1 R. 376-7). The District Court imposed as to each defendant a sentence of two and a half years' imprisonment on each of the seven counts, and a fine of $1,000 under two of said counts, the imprisonments to run concurrently (1 R. 453-60).

Opinion of the Court Below

The District Court (Borah, *D. J.*), filed no opinion. The Circuit Court of Appeals, in affirming, wrote an opinion (*per* Sibley, *C. J.*) which is reported in 117 F. (2d) 110 (8 R. 4801).

Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code, § 240 (a), 28 U. S. C., § 347 (a). The judgment of the Circuit Court of Appeals was entered on January 18, 1941 (8 R. 4823). Rehearing was denied on March 3, 1941 (8 R. 4860).

Questions Presented

I. Is criminal misrepresentation a necessary element in a scheme or artifice to defraud under the Federal mail fraud statute? Does the statute encompass a case where a contract is entered into in respect to which no criminal misrepresentation is made, and which is designed to and does financially benefit the counter-contracting party, but

where, in connection with the contract, a secret profit or "bribe" is paid?

II. Where a criminal case is tried and submitted to the jury on the theory that a verdict of guilty may be returned if the jury finds that the defendant committed either of two allegedly criminal acts, or both, and the jury returns a verdict of guilty, may an appellate court affirm the judgment of conviction while holding that one of the two allegedly criminal acts was not established against the defendant? Under such circumstances has the defendant received a jury trial as required by law?

III. In view of the cumulative factors of prejudice disclosed by the record herein, including the conduct of the prosecutor both prior to and during the trial, did the petitioners receive a fair trial as defined by applicable Federal standards? In this connection, was the evidence against these petitioners so "strong" or "overwhelming" as to warrant a holding that the prejudicial factors were immaterial to the conviction?

IV. Where State and Federal officials have been exchanging information and cooperating in respect to a criminal case in which a Federal indictment has been returned, and the State officials perpetrate an unconstitutional search against the accused, may documents obtained as the result of such search be offered by the Government, and received in evidence against the accused on the trial of the Federal case on the allegedly exculpating ground that the Federal officials did not actually participate in the State proceedings for the search?

Summary Statement of the Matters Involved

(A) The Indictment

Summarizing the indictment (1 R. 103-30), the Circuit Court says that it sought to charge the statutory offense by "misrepresentation of results achieved" under a contract obtained from a public body, and "by corrupting an official," presumably as a means of obtaining the contract (8 R. 4807).

The indictment alleged the following *scheme* in substance: That the Board of Levee Commissioners of the Orleans Levee District had outstanding five series of bonds aggregating about $5,500,000; that a plan of refunding these bonds was to be proposed to the Board by petitioners Newman and Harris, partners in a New Orleans bond house, which plan would include a provision to pay them 25% of the savings effected; that on actual savings of $729,000, fees of $496,000 would be charged, which would be exorbitant and excessive and far beyond the value of the services rendered; that such fees would be divided one-half to Newman and Harris, one-third to Shushan (formerly a member and president of the Board), and one-sixth to Miller (a public accountant); and that Miller would surreptitiously pay 70% of his one-sixth to Waguespack, then a member and chairman of the finance committee of the Board. Shushan, it was alleged, was corruptly to influence Governor Leche to approve the plan; Waguespack was corruptly to influence the Board to accept the plan; and money was also to be paid to one Fitere, an employee in the office of the Board, to spy and inform on what competitors in the bond business might do.

The *false representation* alleged was that the saving put forth as the basis upon which compensation was to be paid was falsely represented, in that it was figured with-

out discount back to present worth; and the Board was deprived of fair judgment in the matter by means of the corruption.

The alleged *object* of the scheme was to obtain sums of money from the Board and the taxpayers to be converted to the use of the defendants. The *mailings* alleged were principally in paying and dividing the fees.

(B) The Case in Substance as to These Petitioners *

1. Contract of July 10, 1936; Performance by Newman, Harris & Co. "with Skill and Success."

Newman, Harris & Co., a partnership composed of petitioners Newman and Harris, is a New Orleans house dealing chiefly in the purchase and sale of municipal securities. The firm had been a frequent bidder for and successful purchaser of bond issues of the Orleans Levee District; no house had been more active or more experienced in this field (3 R. 2253).

The Orleans Levee District is an agency of the State of Louisiana, embracing the City of New Orleans, the affairs of which are conducted by a Board of seven Commissioners, serving without compensation. The Levee Board constructs and maintains levees protecting the City of New Orleans and vicinity, and also maintains the New Orleans Airport and other facilities.

In July, 1936 (and for a considerable period theretofore), the finances of the District were in a difficult condition (2 R. 1360 ff.). Interest rates on the $21,000,000 of District bonds then outstanding ranged from 4¾% to 6% (see Ex. D-2, 7 R. 4010). Approximately one-half of every dollar of the Levee Board's fairly rigid income (derived almost entirely from limited taxation) was being

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* A somewhat extended statement is necessary because the Circuit Court of Appeals does not state the facts except in cursory form, and does not adequately present the position of these petitioners.

applied to bond service (2 R. 1361). In 1935 a rate of 5% was the best that could be obtained from local banks on bonds which had to be issued to fund certain outstanding indebtedness (see Ex. D-2, 7 R. 4010). District obligations had a bad reputation with investors and in financial circles (3 R. 2252). Moreover, the bond structure was uneven, the amount of principal and interest required to be paid being markedly higher in some years than in others (Ex. NH—Chart C, 8 R. 4324).

Upwards of $13,000,000 of bonds out of the total of $21,000,000 could, by their terms, be called for payment and refunded during the year following July, 1936 (Ex. G-29, 5 R. 3032). Expert advice was plainly needed (3 R. 1628).

On July 10, 1936, at a public meeting of the Levee Board, called on proper notice, at which five Commissioners and counsel to the Board were present, petitioner Newman on behalf of his firm proposed to the Board, and the Board voted unanimously to accept, a contract providing for the employment of the firm by the Board until July 15, 1937 (Ex. G-30, 5 R. 3036-50). On January 28, 1937, the contract was extended for sixty days to September 15, 1937, again upon the unanimous vote of the Board with counsel present (Ex. G-42, 5 R. 3221, 3228-9).

The contract (Ex. G-29, 5 R. 3032-6) stated that "Upon a careful study of the structure of the funded debt of your Board * * *, we feel sure that we could evolve a sound and conservative plan of revising your bonded debt that would result in a substantial saving to your Board through the lowering of interest rates of your outstanding bonds callable prior to July 15, 1937, and would also result in a great improvement of your credit * * *." During the period of employment the firm was to plan and recommend to the Board one or more refunding operations to be conducted under the supervision of the firm. All expenses of the refunding operations—whether or not completed

or successful—were to be borne by the firm: this would include legal opinions, advertisements, printing, research, etc. Upon recommending any refunding to the Board, the firm was obliged to put up a guaranty deposit of 1% of the principal amount of the issue to be called. In case any suggested refunding failed of accomplishment because no bid acceptable to the Board was received for the new issue, the firm was to forfeit the deposit; in case a bid acceptable to the Board was received and the refunding was accomplished, the firm was to receive as compensation "25 per cent of the saving and gain effected by your Board through the refunding operation," again forfeiting the 1% guaranty deposit if and to the extent that the premium paid by the purchaser of the new issue was insufficient to pay the call premium on the issue refunded. The compensation was thus purely contingent. Finally—and importantly—the contract provided that "we [Newman, Harris & Co.] bind ourselves not to bid on any of the refunding bonds offered for sale, hereby agreeing that we shall be ineligible to make a bid therefor." Thus the firm, previously very active in the field, barred itself from the profits which it had customarily made in the purchase of Levee Board bond issues (3 R. 2253).*

During the life of the contract—fourteen months—Newman, Harris & Co. devoted more than half its total time to the work (3 R. 2281), which required painstaking effort in analyzing the entire financial condition of the District, planning and conducting the refundings, guaging and discreetly developing the market, etc. (3 R. 2279 ff.).

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* The legality under Louisiana law of an employment contract for advisory services of this general nature was upheld by the Supreme Court, *State ex rel. Maestri* v. *Cave*, 193 La. 419 (7 R. 4204-22), in July, 1939, prior to the trial herein, the emphasis being upon the fact that the financial advisor, by excluding itself from bidding, has avoided any duality or inconsistency of position (7 R. 4220-1). See also the testimony of an outstanding legal expert on the same question, 4 R. 2391-2, 2410-11.

The firm recommended, conducted and concluded on behalf of the Board three notably successful refunding operations, which were authorized and approved as required by law by the Levee Board (Exs. G-36, 43, 49, 5 R. 3063, 3244, 3351) and the State Bond and Tax Board (Exs. D-5, 6, 7, 7 R. 4113-20). It recommended a further refunding which did not eventuate because high water and flood conditions destroyed the market (3 R. 2295, 1689; Ex. G-172-A, 6 R. 3648).

The three successful operations, completed in January, July and August-September, 1937, resulted, respectively, in the refunding of $1,881,000 of 5% bonds by a like amount of new bonds bearing an average interest rate of 3.58%; the refunding of $1,324,000 of 5% bonds by a like amount of new bonds bearing an average interest rate of 3.97%; and the refunding of $2,280,000 of 4¾% bonds by a like amount of new bonds bearing an average interest rate of 4.15% (Exs. G-38, 45, 51, 5 R. 3112, 3295, 3380). All the sales were public, and competition among purchasers was stimulated, certain houses coming into the field that had never done so before (3 R. 2244, 2280). "Split-rate" bids* were solicited—the first time such a method had been used in the territory (3 R. 2287). The interest rates received on the refunding issues were the lowest in the history of the Levee Board (2 R. 1338-9; see Ex. D-2, 7 R. 4010).

Although Newman, Harris & Co. was privileged under the contract to carry through the refunding of upwards of $13,000,000 of callable bonds, it limited itself to $5,485,000. While more bonds could have been refunded with profit to the Levee Board (and hence to the firm),

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* For example, the solicitation of bids on the first refunding set forth two alternative schedules of principal maturities, with provision that any rate or rates of interest not exceeding 4% might be bid upon one schedule of maturities, and any rate or rates of interest not exceeding 4½% might be bid upon the other schedule (Ex. G-38, 5 R. 3119).

petitioners felt, and stated to the Board at the time, that maximum benefit to the Board would be derived by not crowding the market (Ex. G-43, 5 R. 3244-95; 3 R. 2296).

The refundings were sound. Prior to the intervention of Newman, Harris & Co., the Board (and the taxpayers) were faced with total interest requirements of $5,474,744.17 on the $5,485,000 in principal amount of bonds involved (3 R. 1691). By means of the refundings those requirements were cut down to $3,300,212.92—a saving of $2,174,531.25 (3 R. 1692), or $1,984,925.92 if net premiums paid on called bonds are taken into account. At the same time, not only was there no increase in the principal debt, but principal maturities were so revised in relation to the whole financial condition of the District as to bring the annual outlay for debt service more nearly within the actual and anticipated income (4 R. 2314 ff.; Ex. NH—Chart C, 8 R. 4324). The position of Levee Board obligations in the market was enhanced both by comparison with past performance of District securities and by comparison with the securities of other Louisiana government entities (3 R. 2291-2).

During the trial the prosecution strenuously sought to discredit the work done by Newman, Harris & Co. under its contract of employment (*e. g.*, 3 R. 1513, 1517, 1701). Although this effort must have had ponderable effect with the jury, the Circuit Court of Appeals specifically holds that the performance by the firm under the July 10, 1936 contract was skillful and successful. The court says:

> *"The refunding, in three installments, of about half the callable bonds was accomplished within the time the contract was to run, with skill and success"* (8 R. 4817).*

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* Italics in quotations ours unless otherwise noted.

2. No Criminal "Misrepresentation of Results Achieved"

The prosecution next sought to prove that petitioners criminally defrauded the Levee Board by representing the "saving and gain" effected by the refundings to be larger than it was in fact, thereby obtaining payment of excessive compensation—this was the "principal false representation alleged" (8 R. 4806). No claim was or could be made that the Newman, Harris transactions resulted in an actual dollar loss to the Board; the only question was as to the extent of the profit.

The bills sent by Newman, Harris & Co. (Exs. G-59, 96, 124, 5 R. 3422, 3473, 3523), which were checked by the Board's auditor (2 R. 1292 ff.), paid by officers of the Board (*e. g.*, Ex. G-64, 5 R. 3428), and passed upon in the periodic audits made by the State authorities (3 R. 1542 ff.), and which remained unquestioned, so far as petitioners were aware, for two years, figured the "saving and gain" by aggregating the interest payable over the unexpired period of the old bonds and the net call premiums paid on such bonds; aggregating the interest payable on the new bonds and the premium paid by the purchasers; and striking a difference between the two. This is what is called in the record the "arithmetical" method. On this basis the net "saving and gain" effected was $1,984,925.92, on which Newman, Harris & Co. received gross compensation of $496,231.48 and net compensation of $398,220.01 (taking into account $65,750 of guaranty deposits forfeited* and out-of-pocket expenses of $32,-261.47, but not counting any part of a very substantial overhead, 3 R. 2280-1) (Ex. G-157, 6 R. 3569-73).

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* Guaranty deposits were forfeited on the three successful refundings, as well as the one abortive refunding, because the purchasers' premiums were insufficient to pay the call premiums on the old bonds.

The prosecution's theory was that "saving and gain" should have been figured by discounting savings back to "present worth," more particularly as follows (see Ex. G-172, 6 R. 3633-46):

> Set up a table of what was required yearly by way of principal and interest payments to service the old issue of bonds; set up a similar table as to the new issue of bonds; ascertain the yearly differences in amount; discount each of such yearly differences back to the date of the refunding, using as the percentage rate of discount the average rate of interest payable on the new issue; the sum of such present values (with an adjustment for premiums) represents the "saving and gain" effected.*

According to the indictment, the "present worth" of the savings was $729,000 (1 R. 108). On the trial the prosecution revised its position and said the figure was $542,366.39 or $542,552.49 (3 R. 1686, 1710). The final claim was that the gross compensation to Newman, Harris & Co. should have been one-quarter of either of the latter amounts, *i. e.*, about $135,000.

In a criminal case it would not suffice to show merely that petitioners were in error about their method of computation. Putting entirely to one side the fact that petitioners' method was accepted and acquiesced in, the very minimum required to be proved would be the deliberate use by petitioners of their method with actual knowledge that another and different method was the only just and proper one—established as a *moral* standard by general practice or by obvious and unimpeachable correctness. And the question whether the petitioners were at fault in any criminal sense turned solely on whether they had wilfully

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* This was the formula suggested by Government witness Jordan. Government witness Williams suggested a different formula which yielded somewhat different results (see Ex. G-173-A, 6 R. 3678 ff.).

misinterpreted and misapplied the following clause in the contract of July 10, 1936:

> "The total payment and compensation to be made us by your Board pursuant to this agreement shall be 25 per cent of the saving and gain effected by your Board through the refunding operation or refunding operations which may be designated by us pursuant thereto. * * *" (Ex. G-29, 5 R. 3035).*

The greater portion of the record is devoted to the question of the correct interpretation of this clause. The evidence showed:

(a) The regular practice in the bond business, and the regular practice of municipalities, is to use the "arithmetical" method in figuring interest costs incurred and savings effected through bond refundings; no other method is used (2 R. 1319 ff., 3 R. 1671, 4 R. 2394 ff.). This is the method recommended by the Investment Bankers Association of America (4 R. 2397) and employed even in finding the lowest of several "split-rate" bids, where application of the opposing theories may radically affect the results (2 R. 1324, 4 R. 2396). Practical bond men like petitioners undoubtedly think in terms of the "arithmetical" method (see 3 R. 1671).

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* In a letter dated October 7, 1936 (directly prior to the first refunding) sent by Newman, Harris & Co. to the Board, the firm defined precisely what the quoted clause meant and asked the Board to signify whether that was their understanding also (Ex. G-31, 5 R. 3057). This definition was the simple arithmetical one actually applied both in ascertaining the savings effected by the Newman, Harris refundings and in figuring the compensation to the firm. The Board signified its agreement by letter dated October 13, 1936 (Ex. G-32, 5 R. 3060), signed on behalf of the Board by President Thomas (who testified he believed the contract was "splendid," and still believes so, 3 R. 1626), after telephone communication with members,—a not unusual procedure at the Board (2 R. 1144-5). The Circuit Court of Appeals, however, excludes the October 13 letter from consideration on the ground that it did not constitute formal action of the Board. Under this ruling we are remitted to an interpretation of the contract of July 10, 1936.

(b) While apparently granting that such is the regular practice, the prosecution contended that it resulted in unfairness when used to base compensation to a financial advisor; and accountants were offered by the prosecution who analogized the problem to that of figuring the present value of money to be received by a creditor in the future (3 R. 1719), finally evolving a "present worth" formula as above set forth. Defense experts attacked this theoretical analysis by showing that, as interest liabilities are immediately written off by a municipality when a refunding occurs, the savings are presently realized (4 R. 2407), and they questioned the use, in any event, of the average interest rate payable on new bonds as the percentage discount rate in computing the so-called "present worth" (3 R. 1694 ff., 4 R. 2444).

(c) It became obvious that the real inquiry in determining the fairness of compensation based on savings was not merely as to the theory of computing savings, but also as to the rate of compensation applied to savings; for a high rate on "present worth" of savings might yield larger compensation than a low rate on "arithmetical" savings (*e. g.*, 4 R. 2412). And the question of fairness must obviously be determined not as a matter of hindsight, but in view of the probabilities and prospects at the time the employment contract was offered for acceptance to the Board. As of July 10, 1936, it was uncertain whether the Newman, Harris contract would yield a large return, a small return, or no return at all, since it was entirely contingent on prospective savings; moreover, the contract involved payment of guaranty deposits and marketing expenses, and excluded the firm from bidding, thus eliminating an important source of profits to the firm. Just prior to July 10, 1936, Newman, Harris & Co. actually made an estimate of the prospective profits under the contract. The firm's work-sheets are in evidence (Ex. NH-8a-k, 8 R. 4237-46). These work-sheets show that the 25%

rate was checked against "arithmetical" savings to be anticipated if the market remained constant. The resulting anticipated compensation was about 3% of the principal amount of the bonds (3 R. 2278). Assuming that the 25% rate was understood as applying to the "present worth" of savings, it is evident that the anticipated compensation as of July 10, 1936 would have been so low as to preclude any bond house from taking on the work. In point of fact the market did *not* remain constant; it rose substantially after July, 1936 and reached an *all-time high* in January, 1937 (3 R. 2279, 2244). But this development was not expected in July, 1936 (3 R. 2279, 2293).

(d) Finally, the prosecution's position is shown to be unrealistic *even in terms of hindsight,* after all elements of contingency and risk are eliminated. According to the prosecution's claim, the firm should have received about $135,000 as gross compensation under the contract. Against this, some $65,000 would have to be deducted for guaranty deposits forfeited, and some $32,000 for out-of-pocket expenses. The net of $70,000 (if only guaranty deposits are deducted) or of $38,000 (if guaranty deposits and out-of-pocket expenses are deducted) would each be proportionately *less* than the *minimum* compensation which Newman, Harris might justifiably have expected if the employment arrangement had been "*standard,*"—*i. e., not* dependent upon any material contingency, *not* involving forfeiture of guaranty deposits, and *not* involving the exclusion of the advisor from bidding on or dealing with the refunding bonds (see 4 R. 2451-2, 2460, 3 R. 2294). The figure $70,000 would be 1.27%, and the figure $38,000 would be .69%, of the principal amount of the bonds refunded. Compensation to Newman, Harris & Co. under a "standard" arrangement would not have fallen below 1½ or 2%; the outstanding municipal bond expert, Mr. David Wood, testified that compensation under "standard" arrangements ran between 1½ and 5% (4 R. 2403 ff.).

Thus, considered even after the event, the prosecution's theory of interpretation of the Newman, Harris contract is far from convincing; and to hold that it could establish a practical *moral* test to be applied in a *criminal* case would be little short of absurd.

On the array of evidence outlined above, the Circuit Court of Appeals could only hold, and it did hold, that no criminal "misrepresentation of results achieved" was shown (8 R. 4807, 4821-2), thus casting down the main prop of the Government's case as to these petitioners. The court does indeed state that in its opinion the questioned clause "would be construed to mean" that Newman, Harris & Co. must wait for its compensation until the savings "accrued" year by year in the future; or if compensation were recoverable presently, then the savings upon which it was based should be reduced to present value "at a rate of discount found to be justly applicable" (8 R. 4821). In this view of the contract (which is not the same as the Government's indictment theory or theory at the trial), the compensation received by Newman, Harris & Co. seems to the court so exorbitant "as to *indicate* fraud or mistake in a *civil proceeding*" (8 R. 4822); but the court holds that there was not enough in this phase of the case alone to base a verdict of criminal guilt; on this phase of the case petitioners would have been entitled to a directed verdict of acquittal.

We note here—and shall emphasize below—that the District Court, in its charge to the jury, was of an opposite opinion; for the charge (4 R. 2759) authorized the jury to bring in a verdict of guilty against these petitioners based upon a finding of criminally fraudulent misrepresentation of results achieved under the contract.

3. Alleged Complicity of These Petitioners in "Corrupting an Official."

Holding that a criminal conviction of these petitioners could not be predicated upon the alleged misrepresentation of the contract of July 10, 1936, the Circuit Court proceeds nevertheless to affirm petitioners' conviction on the crucial ground that it was a "*jury question*" whether petitioners were knowingly implicated in "corrupting an official"—the "bribe" of Waguespack, laid in the indictment and urged at the trial as the *means* by which the alleged misrepresentation was put across.

This ruling squarely presents for review—see the first Reason for the Allowance of the Writ—the question whether, following the language of the Circuit Court, "bribery" in itself, absent all "express false representations," falls within the mail statute (8 R. 4806). The Circuit Court holds that it does, stressing its "essential immorality" (8. R. 4807).

The record presents additional problems which require some elaboration of the nature of the testimony allegedly implicating these petitioners in the "bribe." (a) The Circuit Court holds that whether these petitioners were so implicated was a "jury question." Considering, however, the manner in which the trial was conducted, with the bulk of evidence as to these petitioners centered upon the alleged misrepresentation of the contract; and considering particularly the District Court's charge to the jury, which authorized a conviction *either* for criminal misrepresentation of the contract *or* for complicity in the "bribe," we submit that it is impossible to say that a jury has ever answered or purported to answer, as to these petitioners, that question which the Circuit Court now holds to be focal to the conviction. (b) The record further presents the question whether these petitioners received a fair trial. (See Part (C) of this Sum-

mary Statement.)—On both these questions it is necessary to apprehend the quality of the testimony relating to these petitioners; for if the evidence was "strong" or "overwhelming,"* the claimed errors might conceivably (although, in our opinion, erroneously) be regarded as harmless; but if the evidence was not "strong" or "overwhelming," the claimed errors must be regarded as material.

The matter of entering into an employment contract with the Orleans Levee District was first brought to petitioners' attention on June 2, 1939, during a conversation with Shushan (3 R. 2023-4, 2253), a person of means who had retired as President of the Levee Board in October, 1935 (3 R. 2019), and who was experienced in financial matters affecting that Board. Having in mind the rejection of a proposal made to the Board in 1935 by Scharff & Jones for "guaranteeing" bids on a refunding (3 R. 2255), petitioners expressed doubt whether there was any room for transactions with the Board except by public purchase of their bonds (3 R. 2254). Shushan suggested the basic pattern of an employment contract to be entered into between Newman, Harris & Co. and the Board, and a draft of a proposed employment contract on this pattern was drawn up by petitioners' attorney (3 R. 2258, Ex. NH-5, 7 R. 4201), petitioners still believing that the contract would not be acceptable in view of the Scharff & Jones experience (3 R. 2255, 4 R. 2328-9). Shushan finally suggested that Newman, Harris & Co. must exclude themselves from bidding (3 R. 2258-9). This suggestion appealed to petitioners as overcoming objections to an employment relationship with the Board (3 R. 2259-61); and, as already noted (*supra*, p. 7, note), such a provision was probably vital to the legality of the contract. The

* The words are quoted from *Berger* v. *United States*, 295 U. S. 78, 89.

draft of contract was corrected in several respects and the provision as to exclusion of bidding was inserted (see handwritten notes on Ex. NH-5, 7 R. 4201; *cf.* with Ex. G-29, 5 R. 3032). The 25% contingent compensation first mentioned by Shushan was incorporated only after Newman, Harris & Co. had independently computed what that would probably amount to (3 R. 2272 ff.). The employment contract as finally corrected and amended was offered to the Levee Board by petitioner Newman on July 10, 1936 and was then accepted by the Board, having been previously informally discussed with the Board members (3 R. 2269).

Newman, Harris & Co. and Shushan agreed to go joint-account in the venture, sharing equally the profit and loss. Before coming to terms with the firm, Shushan stated that he had a commitment to Miller (a highly reputable New Orleans accountant not known to these petitioners, 3 R. 2261), from whom Shushan said he had gotten the idea (3 R. 2257-8); and Shushan wrote Newman, Harris (Ex. G-26, 4 R. 3010) in effect stating that one-third of his one-half of the net profits was assigned to Miller. Newman, Harris & Co. and Shushan entered into a written contract (Ex. G-27, 2 R. 1216) appropriately expressing the joint-account between them and the direction by Shushan that one-third of his one-half of the net profits, if any, be paid to Miller. In fact, on receiving compensation from time to time from the Levee Board, Newman, Harris & Co. paid in strict accordance with this written agreement, retaining one-half of the net profits for themselves and disbursing one-third to Shushan and one-sixth to Miller (*e. g.*, Ex. M-1a, 8 R. 4327). The firm's records and income tax return disclose the arrangement, and the payments, in full and in meticulous detail (Exs. G-165, 157, 6 R. 3608, 3571).

It now appears—and petitioners insist they did not learn of it until the Grand Jury investigation herein—

that Miller gave a sum equal to 70% of what he received to Waguespack, a member of the Levee Board. We do not pause to consider whether such payment constituted a "bribe," since the primary question is whether these petitioners knew anything about such payment or about any Waguespack connection. Petitioner Newman on behalf of both petitioners vigorously denied all knowledge of any Waguespack connection (4 R. 2308). Miller and Waguespack testified that petitioners had no knowledge of any Waguespack connection; Shushan testified to the same effect and also denied such knowledge on his own part (3 R. 1961, 2156, 2028).

In holding it to be a jury question whether petitioners were knowingly implicated in the Waguespack "bribe," the Circuit Court of Appeals suggests the following points, which were also stressed by the Government below:*

The court says (8 R. 4816) that petitioners did not publicize that they were dividing compensation with Shushan and Miller. Petitioners answered that bond houses frequently act for undisclosed principals, partners and fellow members of syndicates; moreover they believed that Shushan was unpopular with the Board (4 R. 2361-2).

The court suggests (8 R. 4818) that Waguespack was suspiciously active at the Board meeting of July 10, 1936 and at other meetings, and Newman, Harris & Co. advised him of some details of the refinancing. But the Board minutes, which are in evidence, show throughout that Waguespack was customarily very active in Board affairs, and he had an additional interest as chairman of the finance committee. Silence on Waguespack's part would have been more suspicious than activity. Petition-

* Some reference is made in the opinion to Governor Leche, but petitioners did not even know him (3 R. 2271), and the proof certainly shows no criminal connection. The Circuit Court rests its affirmance on the alleged connection with *Waguespack*, who is called the "great stone of stumbling" (8 R. 4817).

ers say that they did not know Waguespack was in any way involved and his conduct did not seem to them extraordinary (4 R. 2363-4).

The court says (8 R. 4816) that Newman, Harris & Co. used secretive methods in banking its fees with Chicago and New York banks and in using certain cashiers' checks in making payments to Miller and Shushan. These transactions were not secretive in the sense that they left no tracks: they were fully disclosed in the firm's books and left a plenitude of documentary evidence elsewhere, particularly in the out-of-town banks with which, incidentally, the firm maintained active accounts both before and after the transactions in question (2 R. 1419, 1441). Petitioners were secretive in the sense that they left a minimum of documents in *local banks*. This, they say, was quite intentional, and was fundamentally necessary if they were to do the best job possible for the Board and correspondingly increase their own compensation. Petitioners were intent upon getting as many bidders into the field as possible; and that they did stimulate competition in all discreetly feasible ways appears from the record (see 3 R. 2299 ff.). A highly important factor in keeping the competition alive was to maintain the pretense that Newman, Harris & Co., usually a leader in the market, was active and in a position to bid; if the contrary became known, bidding by others would have been "chilled" or syndicates would have combined or agreed to eliminate competition among themselves (3 R. 2304). The local banks were potential bidders, and actually participated in the syndicates which purchased the three refunding issues covered by the Newman, Harris contract (5 R. 3134, 3306, 3390; 3 R. 2303). Therefore, care was taken not to leave with those banks documents which might contemporaneously have informed them of the Newman, Harris arrangement with the Board, and particularly of the firm's exclusion from the bidding (3 R. 2299-2304, 4 R. 2370-1). Although, as the Circuit Court observes, the contract of

July 10, 1936 was of record with the Board, in ordinary course it would not be, and in fact it appears not to have been, examined by prospective bidders (4 R. 2370).

The same motive—the firm's conception of its task as turning *against* its colleagues in the bond business to the extent necessary to produce maximum competition among them in the Levee Board refundings—accounts for a further arrangement, in part secretive, to which the Circuit Court adverts (8 R. 4820): the employment of one Fitere, a minor employee of the Board, and the payment to him of some $12,000. The payment (together with the name) is disclosed in the records of the firm as an expense of operations (Ex. G-165, 6 R. 3608-18), and receipts signed by Fitere were in the firm's files and are in evidence (Exs. G-162, 163, 164, 6 R. 3600-1). According to petitioners. Fitere was paid to spy and inform on the comings and goings of bond people—to relay to the firm information valuable to it in its capacity as advisor which was not conveniently forthcoming from the Secretary of the Board (3 R. 2296-9; 4 R. 2374-8). Fitere did relay such information (3 R. 2297). He was able to "hold up" the firm for more than he was worth. The Circuit Court intimates that the reason was that he knew the firm was doing something "very wrong" (8 R. 4820). This is surmise; there is no testimony that he knew anything "wrong." Petitioners' explanation is at least equally plausible: Fitere could exact more money than he had earned because he was—perhaps foolishly—placed in a position where he could tell bond people what the firm did not want them to know, namely, the firm's contractual relationship with the Board, and particularly its exclusion from bidding. (The further relevant facts as to Fitere are that he was hired months after July 1936, and had no access to confidential information of the Board and no possible influence with Board members or officials (2 R. 1131-2, 3 R. 1616, 1626). Fitere died before the trial.)

Unless the foregoing analysis is true, it is at least difficult to explain the undisputed fact that Newman, Harris & Co. went so far as to appear at public sales of the refunding issues bearing certified checks deliberately drawn on local banks, and giving every appearance of being interested bidders for the issues (3 R. 2301-2, 2146).

We have here singled out the phases of the evidence which are said to make a case against these petitioners. Granting that the corruption of an official would not proclaim itself, and that proof positive is not to be expected, it is still a fact that the evidence concerning these petitioners was neither "strong" nor "overwhelming" (the Circuit Court does not suggest that it was), and the question whether it excluded the hypothesis of innocence was debatable. It is fair to say, also, that the situation was such as to call for extreme care lest these petitioners be held guilty by mere *association* with other possible wrongdoers as to whom the evidence may have been regarded as more substantial. As to Miller and Waguespack, it was at least clear that the former gave and the latter took sums of money; as to these petitioners the evidence was, at worst, far removed from direct complicity in such payments. As to Shushan, evidence was admitted (whether correctly or incorrectly) called in the record the "O'Neil transaction," which tended to show that he and Waguespack had mutually participated in a deal involving Levee Board bonds just prior to the present transaction. Undoubtedly this had great effect with the jury. Concededly, however, these petitioners knew nothing about the O'Neil transaction; it was utterly irrelevant as to them (3 R. 1817-8). (This did not deter the prosecutor from prejudicially stating in his summation that petitioners did know of the O'Neil transaction; see *infra*, pp. 29-30).

District Court Charge Versus Circuit Court Ruling

Upon such proofs the Circuit Court holds that it was a "jury question" whether these two petitioners were criminally tied to the Waguespack "bribe"; this is the *vital* jury question, since the Circuit Court also holds that no other branch of the case would support a criminal conviction. And the Circuit Court necessarily *assumes* in affirming the conviction that the jury by its verdict did answer that question in the affirmative as to these petitioners.

In the second Reason for the Allowance of the Writ, we show by reference to the District Court's charge and the development of the case that this assumption was erroneous. There is thus posited the question whether, by reason of the Circuit Court's shift of theory and emphasis, these petitioners have not been deprived of the essence of a trial by jury, *i. e.*, a definite jury finding on the precise issue of criminality as framed by the court of higher authority.

(C) Prejudicial Factors Depriving These Petitioners of a Fair Trial

By motions for continuance of the trial of the case (1 R. 622, 2 R. 760, 939), applications to punish certain newspapers for contempt (1 R. 572, 578, 635, 696, 2 R. 948), objections to the conduct of the prosecutor (2 R. 1077, 3 R. 1892, 4 R. 2506, 2508, 2521, 2522, 2535, 2539, 2557), and motions to declare a mistrial (2 R. 1076, 1307, 4 R. 2500, 2508), these petitioners sought to counteract or avert the prejudice which surrounded and entered into the trial of this case. The trial judge not only failed to take appropriate corrective action but, as we submit, unwittingly precipitated further prejudice.

Petitioners' claim (8 R. 4644-7, 4703-12) that they did not receive a fair trial was rejected by the Circuit Court of Appeals, although that court conceded that the situation was extraordinary, inferentially crit-

icized the trial judge, and rather severely criticized the prosecutor (8 R. 4807-8). Within the limits of this petition we cannot do more than indicate certain features of the case which render the Circuit Court's disposition of this serious claim at least so far questionable as to call for review by this Court. The printed record and the voluminous physical exhibits (see 1 R. 564-9) disclose the factors of claimed prejudice with peculiar fullness, and reference must be had to that whole record finally to appraise the merits of petitioners' contention.

The Circuit Court correctly states that the situation was *"indeed extraordinary"* (8 R. 4808) — the court may have had in mind, among other things, a spectacle undoubtedly unusual in the administration of criminal justice in this country: the spectacle of "convict parades" in which a defendant on trial for his liberty was shown forth already pre-judged and condemned (2 R. 931-3).

The trial herein ran from December 4 to December 22, 1939. This was at the height of a political campaign which had commenced in strength during July, 1939 and continued with mounting public excitement until the holding of the Democratic primary election on January 16, 1940. The campaign was certainly among the most heated in the history of the State of Louisiana (2 R. 767-930). Without impugning the motives of those who caused the trial to be held when it was, it is fair to say that no better time could have been selected to suit the strategy of the reform faction of the Democratic Party; and, by the same token, no worse time could have been selected for the fair trial of a case so directly and, at least as far as the newspapers and politicians were concerned, so designedly tied to political considerations.

From the very outset—even prior to the handing down of the first indictment on August 21, 1939—the case was tagged in the public mind as the "Shushan Case." Construed as involving graft charges against a former officer-

holder identified with the faction in power, the case was seized upon and widely exploited as the test of the pretensions of the reform group. Having put its reliance on the "Shushan Case" as a major argument in the campaign, that group was not averse to prejudicing the case so that a verdict of guilty might be assured and its political position thus strengthened and vindicated.

Petitioners Newman and Harris were not public figures and had never cast themselves into the political arena. They were, however, promptly associated with Shushan and became ciphers in a vast political war not of their own making.

From the time when the "Shushan Case" first broke in the press (*New Orleans Times-Picayune,* July 29, 1939) all four principal newspapers in the City inaugurated, and pursued until the end of December, a systematic and sustained attack on Shushan and his alleged confederates as archetypes of that corruption which the reform group desired to root out of the community. An indication of the violence of the attack is given by the fact that one of the newspapers could unabashedly publish as early as August 4, 1939 (*New Orleans States*) a letter from a correspondent suggesting "a few oldfashioned necktie parties" if prosecutions did not prove "sufficient." The scare headlines, *ex parte* news articles, inflammatory editorials and cartoons and caricatures are collated as physical exhibits herein. Like appeals to passion were made over the radio and at huge political mass-meetings (see 2 R. 931-2).

That the outcome of the "Shushan Case" was an issue in the campaign is exemplified by the practice of the *Times-Picayune* and the *States* in publishing regularly a two-column box entitled "Summation of State Situation" in which the case and the names of these petitioners figured. With an interruption, hereinafter noted, this "Summation" appeared continually from late July until the end

of December. One of the candidates for Governor had on exhibition at his political headquarters a picture representing Shushan ("I tried to fix de jury"), among others, in prison stripes (2 R. 932); the same candidate went further and staged parades of men in convict garb, one of them carrying a placard labeled: "Shushan" (2 R. 933). Such parades continued during the trial herein, and there is at least an interesting possibility that members of the jury (who were not sequestered) observed one or more of such torchlight processions in which a defendant on trial before them appeared with a pre-verdict of guilty. Another candidate for Governor spoke of "jail-bound birds" (*Times-Picayune,* November 13); he claimed personal credit for having made the appeal to Washington which resulted in the intervention of the Federal Government in the person of the prosecutor herein, Mr. O. John Rogge, Assistant Attorney General (*Times-Picayune,* November 9).

The Circuit Court correctly states that Mr. Rogge's "encouragement of the newspaper publicity about the case was ill-judged, and improper"; also that he "contributed to what became an abuse" (8 R. 4808). In late July the Assistant Attorney General established himself in New Orleans, having previously announced in the press his impending clean-up campaign (*Times-Picayune,* July 26). He made public speeches describing the purpose of his visit (*States,* August 8). From time to time he gave interviews and made "official announcements" to the newspapers concerning the nature of the matters then under consideration by the Federal Grand Jury and other investigating agencies. He specifically prejudiced the "Shushan Case" by announcing—both before and after the indictments herein—that the Grand Jury was investigating "jury tampering" and "perjury" in connection with the trial and acquittal of Shushan in 1935 on charges of income tax evasion (*e. g., Times-Picayune,* August 12; *Tribune,* August 12; *Item,* November 25; *States,* August

10, November 24); and on one occasion he had himself photographed with bullets sent to him in an anonymous letter threatening his life if he went forward with the Shushan jury-tampering investigation (*Tribune,* August 15; *States,* August 14). Nothing came of this alleged Grand Jury investigation; but the obvious, if unintended, result of the repeated announcements by the Assistant Attorney General concerning it, was to conjure up for the veniremen in the present case the prospect of a similar inquiry into their conduct in the event they acquitted the defendants. Not only, then, did the prosecutor fail to dampen the ardor of the press and the public; he joined hands with them in stimulating the excitement.

Of a piece with these prejudicial activities was the prosecution's behavior in connection with the sensational seizure by State officials of documents of Newman, Harris & Co. two days after the return of the first Federal indictment. This matter is described in detail in the fourth Reason for the Allowance of the Writ, where it is contended that the use of the seized documents by the prosecution at the trial herein violated the constitutional rights of these petitioners.

Following the return of the indictments and after the case was actually in the lap of the court, the barrage of damaging publicity continued, although the plainest principles of fair play required that the defendants, already pre-judged in the public mind, should not be further prejudiced. Thus a cartoon in the *Times-Picayune* of November 1 depicted petitioners Newman and Harris in association with fifteen political persons with whom they had never had any connection, all branded "crooks." And thus, on November 20, after the petitioners had actually been arraigned, the *Item* in effect demanded convictions of all then indicted persons, saying, "Indictments and convictions undoubtedly influence voters in casting their ballots."

On being called for arraignment petitioners applied for a continuance of the trial from December 4 until after the primary election set for January 16 (1 R. 622).* They joined with the other defendants in a petition for a rule requiring the owners and publishers of the four newspapers to show cause why they should not be held in contempt of court—a means to stem the tide (1 R. 572). Affidavits of more than one hundred local residents testifying that a fair trial could not be had (2 R. 767-930), and volumes of current newspaper material, were submitted. The applications for continuance and for a rule in contempt were supplemented and renewed on November 17 and again on November 22 (1 R. 635, 696). On the latter date the court was asked whether any judicial action on the original and supplemental petition for a rule might be expected. The court replied that it "had not read the petitions as yet" (1 R. 700). Counsel inquired if it would be possible for the court to indicate when some action might be taken. The court replied, "No" (*id.*). The prosecutor ridiculed in the press the applications for a continuance (*States,* November 7). The net effect of the almost disdainful reception of defendants' applications by court and prosecutor was the renewed publication of the "Summation of State Situation," which had been abandoned after applications for the rule were filed.

The trial began on December 4—renewed motions for continuance being denied (2 R. 947-8)—with the court declining to allow specific questions to talesmen on their reaction to the newspaper publicity, etc. (2 R. 1008, 1011). Even so, seven talesmen indicated that their minds were made up. On December 5 the *Tribune* printed a false

* There is no statutory provision for removal of a criminal case from one Federal District to another. Removal from one Division to another of the same District is possible, but would not have been of help in the case at bar.

and prejudicial headline. At the opening of court, the offending publication was shown to the judge and defense counsel moved to declare a mistrial (2 R. 1076). The motion was peremptorily denied without even a question to the jury as to whether they had seen the issue or heard it hawked about (2 R. 1077). Two days later another false and prejudicial headline was printed by the *Item*. Defendants again moved for a mistrial (2 R. 1307). This time there was a poll of the jurors; they said they had not seen that headline, although one of the jurors later informed the court that he was obliged to read newspapers in order to keep abreast of his business affairs (2 R. 1343). The court directed the prosecutor to institute contempt proceedings based on the publications of December 5 and December 7 (2 R. 1310), but at the same time denied the motion for a mistrial (*id.*). In fact the responsible persons were adjudged in contempt on December 14 and were fined (8 R. 4389, 4415). The show of indignation on the part of the United States Attorney in the proceedings for contempt (8 R. 4364) contrasts strangely with the attitude assumed toward the defendants on trial.

In the very trial of the case the prosecutor went to extraordinary lengths—even to the extent of distorting testimony—in order to convict *all* the defendants. He was perhaps *most* unfair in regard to *these petitioners* because of a subconscious feeling that his case against them was weakest. It will be recalled that highly damaging evidence was admitted, called the "O'Neil transaction," as against Shushan and Waguespack, but *not* as against petitioners Newman and Harris. After making a series of subtle attempts to intermingle the O'Neil transaction with testimony relating to these petitioners (see 2 R. 1315, 3 R. 1885), the prosecutor, in summing up to the jury, let out all the stops and directly stated that petitioners Newman and Harris "were together with" Shushan and Waguespack in the O'Neil transaction. A more hurtful distortion

of the evidence could not be imagined. The Assistant Attorney General said (4 R. 2572-3; see also 4 R. 2535-6):

> "The defendants, Newman and Harris, say they did not know that Waguespack was in on the cut, and the defendant Miller says the reason why he did not tell Shushan about Waguespack was accidental.
>
> "Not only was Shushan and Waguespack in the O'Neil deal, but the defendants Newman and Harris were together with them in that deal, and yet in spite of all those deals, with these defendants, arranging four pay-offs, three big ones and one little one, they would have you believe the defendants, Newman and Harris, and Shushan did not know about Waguespack."

A charge specifically contradicting this erroneous statement as to petitioners Newman and Harris, which might in some measure have overcome the prejudice, was refused by the court (4 R. 2784).

To cap the climax, the Assistant Attorney General vehemently declared his personal belief in the guilt of all the defendants as follows (4 R. 2506):

> "I shall try to speak to you with restraint, but I shall also speak to you with feeling and indignation, because I think that all five defendants in this case are guilty as charged in this mail-fraud indictment in all eight counts."

There was an objection (4 R. 2506). Without waiting for the court to rule, the Assistant Attorney General said (4 R. 2506):

> "I wouldn't be here if I didn't think they were guilty, if the Court please."

The court's response to the objection was (4 R. 2507):

> "Well, gentlemen, the Court does not think that any attorney ought to really inject his own personality into the case. The Government is prosecuting the case and the Assistant Attorney General is before you. You

> may draw your own inferences from that, but I ask you to disregard the personal opinion as expressed by Mr. Rogge, because that is not evidence in the case but is only his own view of the matter."

Thus, the fact that it was the Assistant Attorney General of the United States, and not an ordinary United States Attorney, who had expressed the opinion of guilt, was forcefully suggested to the jury, and they were invited to "draw your own inferences from that."

The Circuit Court does not specifically advert to these portions of the summation, and its opinion may leave the impression that Mr. Rogge's statements were provoked by equally vehement summation on the part of defense counsel. The fact is that Mr. Rogge, leading for the Government, made the first summation. His declaration of belief in the guilt of all the accused came in the second paragraph of his address (4 R. 2506).

Specification of Error

The Circuit Court of Appeals erred in affirming the judgments of conviction as to these petitioners, and in failing either to reverse said judgments and order the indictment dismissed, or to reverse said judgments and order a new trial.

Statute Involved

The mail fraud statute (Criminal Code, § 215, 18 U. S. C., § 338, as amended) provides in part as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * *"

Reasons Relied On for the Allowance of the Writ

I. In holding that participation by petitioners in a breach of trust or "bribery" was sufficient, in the absence of any criminal misrepresentation, to constitute a scheme or artifice to defraud within the purview of the mail fraud statute, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, and has decided that question in a way probably in conflict with decisions of this Court, of other Circuit Courts of Appeals, and of decisions of the same Circuit.*

The purport of the Government's case, as evidenced by the indictment and proof adduced, was that petitioners engaged in a prohibited scheme or artifice to defraud by false representations with respect to the "saving and gain" under the contract with the Levee Board, and through such false representations obtained excessive and exorbitant fees from the Board and converted these moneys to their own use. The Government regarded the false representations as the primary element of the crime and the Circuit Court stated, "The principal false representation alleged is as to the savings made under the contract" (8 R. 4806). The "bribery" of Waguespack to betray his fiduciary duties to the Board was alleged and sought to be proved as the dishonest means employed in obtaining the contract and thereby accomplishing the fraudulent scheme.

As shown in the Summary Statement, the Circuit Court found that there was no criminal misrepresentation; it nevertheless ruled that the corruption of a public official as the means of obtaining the contract constituted a scheme or artifice to defraud within the meaning of the mail fraud statute. Criminality was predicated upon the existence of a scheme which was dishonest, essentially "immoral," or

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* The question is raised and preserved at 3 R. 1898-9, 4 R. 2489, 8 R. 4648, 4649.

"inconsistent with moral uprightness." The court said (8 R. 4806-7):

> "But there may be a scheme to defraud by other means than express false representations. A scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another or advises him, would be a scheme to defraud *though no lies were told.* A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. * * * No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud. The *essential immorality* of an arrangement of that sort, or even the use of undue personal influence, is illustrated in *Oscanyan* v. *Winchester Arms Co.*, 103 U. S. 261; *Crocker* v. *United States*, 240 U. S. 74; *Crawford* v. *United States*, 212 U. S. 183; *United States* v. *Carter*, 217 U. S. 286; *Pan American Petroleum Co.* v. *United States*, 273 U. S. 456, 500."

(It is noteworthy that none of the authorities cited is a mail fraud case.)

It is, of course, indisputable that participation in a breach of trust, corruption or bribery is essentially immoral and reprehensible. The issue, however, is whether such acts are within the Federal jurisdiction under a particular statute—bearing in mind that there are no common law crimes or "constructive offenses" against the United States (*United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Resnick*, 299 U. S. 207, 210), and that "one may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an act of Congress." *Donnelley* v. *United States*, 276 U. S. 505, 511. These canons of construction and policy are applicable to alleged offenses

under the mail fraud statute. *Fasulo* v. *United States*, 272 U. S. 620.

The implications of the present decision, which goes beyond the verge of existing law, are of vital significance. If corruption of those in a position of trust becomes a Federal offense where a letter is sent, "though no lies were told," the field of Federal jurisdiction is expanded far beyond the bounds hitherto conceived and applied as marking the limits of the statute, and, it is submitted, beyond the intent of Congress. There would be included under the vague tests enunciated by the Circuit Court—"essential immorality" or "a purpose to do wrong which is inconsistent with moral uprightness"—a variety of offenses, of which commercial "bribery" is but one instance, always regarded as peculiarly within the criminal jurisdiction of the States. Indeed, the mail fraud statute would burst over into the field of civil law and render criminal many cases never before regarded as criminal under Federal or State law,—cases of breaches of trust committed by executors, guardians, trustees or other fiduciaries where there is a concealment of adverse interest and secret profits are made, whether or not the trust is in fact injured. Derelictions such as those condemned by courts of equity in *Meinhard* v. *Salmon*, 249 N. Y. 458, would become Federal offenses. Even if the decision below is limited to the "bribery" of public officials, Federal supervision is expanded to cover every county board and municipal council in the land.

The condition of existing law must be described in order to envisage the scope and importance of the Circuit Court's departure.

(A) The crime denounced by the statute is a "scheme or artifice to defraud," or, as it is otherwise described by the statute, "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Both phrases are intended to describe the same

offense and are generally alleged in the same count (see indictment, 1 R. 104). As this Court stated in *United States* v. *Stever,* 222 U. S. 167, 173, "it would require very subtle distinction to conceive of a use of the mail to promote a scheme to obtain property or money by means of false pretenses which would not also be a 'scheme or artifice to defraud' within the plain meaning of Section 5480" (of the Revised Statutes, the predecessor of present Section 215). See also *United States* v. *Young,* 232 U. S. 155.

In his charge to the jury the District Judge recognized that no distinction existed (4 R. 2751). And the Circuit Court, in an earlier decision (*Livezey* v. *United States,* 279 Fed. 496, 498-9 [1922], *cert. den.,* 260 U. S. 721), expressly overruled the contention that an indictment alleging false pretenses and a scheme to defraud was duplicitous, stating: "We do not think the objection is tenable. It is not pointed out in argument that there is a difference between a scheme to defraud and one to obtain money by false and fraudulent representations, and we are unable to perceive any." The same ruling was made by that court last year in *Morris* v. *United States,* 112 F. (2d) 522, 526 (C. C. A. 5), *cert. den.,* ..... U. S. ....., 85 L. Ed. 61. To the same effect, see *Hass* v. *United States,* 93 F. (2d) 427 (C. C. A. 8).

The scheme or artifice denounced by the statute is, indeed, an old concept whose meaning and scope are fairly well defined. The basic element is the existence of a misrepresentation of a past or present fact or a promise known to be false when made: what is aimed at is "a cheat by means of lies." *Bentel* v. *United States,* 13 F. (2d) 327, 329 (C. C. A. 2), *cert. den.,* 273 U. S. 713. "When the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounces." *United States* v. *New South Farm & Home Co.,* 241 U. S.

64, 70; *Durland* v. *United States,* 161 U. S. 306, 313; *Hammerschmidt* v. *United States,* 265 U. S. 182; *United States* v. *Stever, supra; West* v. *United States,* 68 F. (2d) 96 (C. C. A. 10); *Lewis* v. *United States,* 38 F. (2d) 406 (C. C. A. 9); *Cowl* v. *United States,* 35 F. (2d) 794 (C. C. A. 8); *United States* v. *Dilliard,* 101 F. (2d) 829 (C. C. A. 2), *cert. den.,* 306 U. S. 635.

A further and independently essential element of the crime is the purpose or intent to deprive another of his money or property; otherwise stated, the objective of the scheme must be to obtain money or property, the misrepresentations being the means to attain the result. Thus in *Hammerschmidt* v. *United States, supra,* this Court specifically referred to "pecuniary or property injury inflicted by a scheme to use the mails for the purpose" (265 U. S., p. 189). See also *United States* v. *Comyns,* 248 U. S. 349.

These criteria, established by the cases, conform to the manifest purpose of the enactment. Besides striking at counterfeiting and lottery enterprises (specifically enumerated in the text of Section 215), the statute is aimed at utilizing the mails for obtaining money from the ignorant or unsuspecting by false blandishments or "the allurement of a specious and glittering promise." *Durland* v. *United States, supra,* p. 314; *Etheredge* v. *United States,* 186 Fed. 434 (C. C. A. 5); Letter of the Solicitor of the Post Office Department, Sen. Misc. Doc. #57, 39th Cong., 1st Sess. (1866); Letter from the Postmaster General, H. Rep. Exec. Doc. #22, 46th Cong., 2d Sess. (1890).

The great bulk of cases prosecuted under the mail fraud statutes have involved the garden variety type of swindling of money or property by false representations or promises.

(B) The foregoing definition of the offense was emphasized and reiterated by this Court when attempts were made—sanctioned by lower courts in several instances—to use the statute to punish acts which, although not involving the use of false representations as a means of

obtaining money or property, were dishonest or immoral or constituted other substantive offenses cognizable by the States. The development of the law in these instances reveals a determination on the part of this and other courts to confine the statute to schemes for obtaining property by false representations, and not to permit its use as a catch-all of vague circumference. Dishonesty or "essential immorality," accepted by the court below as a test of criminality, has several times been rejected as beyond the letter and intent of the statute.

In *Horman* v. *United States,* 116 Fed. 350 (1902), *cert. den.,* 187 U. S. 641, the Sixth Circuit Court of Appeals held that a plan to extort money from a person by threats fell within the predecessor statute. The court took the position that a "scheme or artifice to defraud" was not limited in its meaning to deception or false pretenses but included any dishonest scheme calculated to deprive one of his money or property. The court's conception of the extensive scope of the crime is found in its quotation from the American and English Encyclopedia of Law (116 Fed., p. 354):

> " 'To defraud implies or includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence generally imposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another.' "

The Seventh Circuit Court of Appeals reached an opposite result in *Naponiello* v. *United States,* 291 Fed. 1008, 1010 (1923), *dism.,* 267 U. S. 577, saying:

> "We agree that obtaining money through the intimidating influence of threats is a more heinous crime than obtaining money through deception, but threats which the victim believes will be carried into execution unless he acquiesces in the demands are not deceits."

In *Hammerschmidt* v. *United States, supra* (1924), this Court in effect disapproved of the *Horman* decision, saying that it went to the "verge" of the law. Mr. Chief Justice TAFT pointed out that the scope of the mail fraud statute had, since the *Horman* case, been clarified by adding to the words "scheme or artifice to defraud," as they appeared in the statute, the descriptive clause "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 35 Stat. 1130 (1909). Thus, in this Court's view, artifice to defraud signifies deception or cheating, and does not extend to schemes involving such offenses as extortion, thefts by violence, robbery or burglary.

The *Horman* case having been subsequently followed by the Ninth Circuit in *Lupipparu* v. *United States,* 5 F. (2d) 504 (1925), and *Fasulo* v. *United States,* 7 F. (2d) 961 (1925), this Court granted certiorari in the latter case. The decision of this Court (272 U. S. 620) made it altogether clear that deceit or misrepresentation was an integral part of a scheme or artifice to defraud and consequently that the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm was not within the statute.

This Court summarized the Government's position as follows (p. 626):

> "The government insists that in a broad sense threats constitute fraud, and that the section covers the obtaining of money or property of another *by dishonest means.*"

This very contention was adopted by the court below in affirming the conviction of the petitioners herein. It was, however, unequivocally rejected by this Court (pp. 628-9):

> "Undoubtedly the obtaining of money by threats to injure or kill is more reprehensible than cheat, trick or false pretenses; but that is not enough to require the court to hold that a scheme based on such threats is one to defraud within § 215. * * *

"* * * A comprehensive definition of 'scheme or artifice to defraud' need not be undertaken. The phrase is a broad one and extends to a great variety of transactions. But broad as are the words 'to defraud,' they do not include threat and coercion through fear or force. The rule laid down in the *Horman* case includes every scheme that in its necessary consequences is calculated to injure another or to deprive him of his property wrongfully. That statement goes beyond the meaning that justly may be attributed to the language used. The purpose of the conspirators was to compel action in accordance with their demand. The attempt was by intimidation and not by anything in the nature of deceit or fraud as known to the law or as generally understood. The words of the act suggest no intention to include the obtaining of money by threats. There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."

See also, *Norton* v. *United States,* 92 F. (2d) 753 (C. C. A. 9).

Illustrative instances of the refusal of the courts to sustain convictions under the mail fraud statute where the plan, though immoral, dishonest or criminal, lacked the essential elements of a scheme to defraud, are *Stockton* v. *United States,* 205 Fed. 462 (C. C. A. 7), where a scheme to sell loaded dice, intended for use in cheating third persons, was held not within the statute since the dice were accurately described and not misrepresented; and *United States* v. *Smith,* 29 F. (2d) 926 (D. Neb.), where a scheme to conceal an embezzlement was held not within the statute, as the false representations, though made, were not designed to obtain money, but to conceal its theft. The remarks of the court in the latter case on the attempt by Federal prosecutors to invoke the mail fraud statute as a catch-all, thereby invading the province of the States, are suggestive (see pp. 928-9).

The criteria of criminality advanced by the court below are at variance with those set forth in an earlier opinion of the same court in *Etheredge* v. *United States,* 186 Fed. 434 (C. C. A. 5), which held that the statute did not include all types of dishonest, immoral or fraudulent schemes but was limited to frauds involving false representations as a means of obtaining money or property,—"Beyond this, the statute did not intend to go" (p. 441).

(C) Viewed in the light of the standards set forth in the foregoing decisions, the instant case raises a serious question of the applicability of the mail fraud statute.

Reduced to its essentials, there is absent in this case the elements of a scheme or artifice to defraud, as that term has been traditionally understood. The Circuit Court negatived the existence of criminally false representations; and it conceded the skillful performance of the contract and a pecuniary gain—not a loss—to the Board. There is involved, at most, a breach of trust, or the offense of bribery which is punishable by State law.*

A novel question is presented whether the failure to disclose a bribe or the adverse interest of a fiduciary constitutes a misrepresentation by silence falling within the statute. This question has never been decided so far as we have been able to find. It was posited but left unanswered in the recent decision of the Eighth Circuit Court of Appeals in *Hass* v. *United States,* 93 F. (2d) 427 (1938), which is strikingly similar to the case at bar. There the indictment alleged in substance that defendants, some of whom were officers of a fraternal benefit society known as Modern Brotherhood of America, proposed to the delegates of the society that it be merged with the Independent Order of Foresters, representing that the purpose of the

* It is, moreover, highly questionable whether the "mailings" proved were in execution of the scheme as required by the statute, and particularly of the scheme as now envisaged by the Circuit Court.

merger was to safeguard the interests of Modern and also that they would receive no money from the merger other than the salaries which they had previously received. It was alleged that these representations were false in that the defendant officers, in addition to their salaries, were to receive $300,000 from the Foresters for effecting the merger, and that the purpose of the merger was not to protect and safeguard the interests of Modern. At the trial it appeared that the defendant Parks, a broker, had entered into an agreement with the Foresters whereby he was to receive $750,000 for effecting a merger with Modern, and that he agreed with the other defendants, officers of Modern, to give them a portion of this fee upon completion of the merger. Although the defendant officers concealed the arrangement for secret profit from the members of Modern, the court found that they had not made misrepresentations as alleged; for it appeared that, because of the precarious financial condition of Modern, the merger was for its benefit and in order to safeguard and protect its interests; and it was not established that the defendant officers had stated that they were receiving no other compensation as a result of the merger. Defendants were convicted and an appeal was taken. The Circuit Court, after passing upon the validity of the indictment,* reversed the judgment, holding that the scheme established at the trial was fundamentally different from the one alleged,—which was also the situation in the case at bar and should in itself have required a reversal herein. On this point there is an unmistakable conflict between the *Hass* case and the present case. Said the court (p. 435):

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* The court held, in line with decisions above discussed, that an indictment alleging a scheme to defraud and for obtaining money by false representations was not duplicitous; the scheme to defraud and for obtaining money, etc., was a single offense. The decision of this Court in *United States* v. *Stever, supra*, and that of the Fifth Circuit in *Livezey* v. *United States, supra*, were cited as supporting authorities.

> "* * * Thus, while charging a scheme to obtain, by means of certain false pretenses, a secret profit from the Foresters and its members as they should exist after merger, the government succeeded in proving a scheme whereby the defendants other than Parks were to obtain, by concealment of facts which they were obligated to disclose, a secret profit from Parks upon completion of the merger."

The question whether the breach of trust and concealment of secret profit constituted an offense within the Federal jurisdiction under the mail fraud statute was expressly left open, the court stating (p. 435):

> "Whether the breach of trust of which the defendants who were officers of the Modern Brotherhood were clearly guilty in concealing what it was their duty to disclose, thereby obtaining for themselves money from Parks which the law would not permit them to convert to their own use, would be a scheme or artifice to defraud under section 215, Criminal Code, 18 U. S. C. A. § 338, provided the mails were used in executing or attempting to execute the scheme, it is not necessary to determine, since the scheme which was proved was not, in any event, the scheme which the government alleged in the indictment."

No other authority so far as we know has addressed itself to this basic question. Five cases were cited by the Circuit Court below, but, as already noted, none involved the mail fraud statute. Four* were civil actions in which the courts refused to enforce or granted rescission of contracts obtained by bribery or by breach of trust. Their inapplicability is manifest. The fifth, *Crawford* v. *United States*, 212 U. S. 183, involved a criminal conviction for defrauding the United States under a different statute

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* *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261; *Crocker* v. *United States*, 240 U. S. 74; *United States* v. *Carter*, 217 U. S. 286; *Pan American Petroleum & T. Co.* v. *United States*, 273 U. S. 456.

(Rev. Stat., § 5440, predecessor of Criminal Code, § 37, 18 U. S. C., § 88), whose language is much broader than that of Section 215. The statute involved prohibits conspiracies "to defraud the United States *in any manner or for any purpose.*" The mail fraud statute, particularly through the amendment of 1909, clearly limits schemes to defraud to those for "obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Hammerschmidt* v. *United States, supra.* It should be noted that this Court, in the *Crawford* case, in fact reversed the conviction.

Other authorities which have been suggested as supporting the position of the court below do not pass upon the issue. In *United States* v. *Buckner,* 108 F. (2d) 921 (C. C. A. 2), *cert. den.,* 309 U. S. 699, notwithstanding some general language in the opinion, the court actually found that the scheme was to defraud bondholders of their money by misrepresentations. As the court said, the falsehoods consisted of sending letters to the bondholders relating to contributions "under the false pretense that they were to be expended solely for committee purposes" and "intent to misappropriate at this time could clearly have been inferred" (p. 926). *Campbell* v. *United States,* 12 F. (2d) 873 (C. C. A. 9), *cert. den.,* 273 U. S. 722, and *Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5), *cert. den.,* ..... U. S. ....., 85 L. Ed. 75, also involved actual misrepresentations. *United States* v. *Manton,* 107 F. (2d) 834, *cert. den.,* 309 U. S. 664, like the *Crawford* case, involved the broad conspiracy statute (Criminal Code, § 37). It has no bearing upon the construction of Section 215, a substantially different and more limited statute.

In sum: The ruling of the Circuit Court herein, in eliminating the necessity for false representations or the design to inflict a property damage, and in predicating criminality upon the "essential immorality" of a breach of trust or corruption of a fiduciary through "bribery"

or otherwise, appears to conflict with the decisions and policy position of this Court in such cases as *Hammerschmidt* and *Fasulo*.

Breach of trust and "bribery" are historical concepts distinct from the kinds of cheats by use of lies hitherto conceived as falling within the mail fraud statute.

The present case represents the first or second instance in the history of the statute in which it was sought to be used to punish breach of trust or "bribery." The well-known origin and purpose of the statute, together with its commonplace use, suggest that we are here faced with an important departure.

The consequences of the departure are striking, as already indicated. The extension of Federal jurisdiction in crimes raises the danger of debilitating the State processes. And the vagueness of the standard here sanctioned—"essential immorality" (as opposed to the traditional category of false representation)—should give pause to those concerned with maintaining the criminal law as a definite system, whose limits can be reasonably predicted, and which is not capable of subversion to *ad hoc* purposes or influences.

II. In affirming petitioners' conviction upon a finding of fact not necessarily made by the jury, the Circuit Court of Appeals has decided a question of Federal law in a way probably in conflict with applicable decisions of this Court.*

The indictment charged misrepresentation of the contract and corruption of an official. At the trial the Government laid its emphasis, so far as these petitioners were concerned, on the alleged misrepresentation of the contract.

In his charge to the jury the District Judge, without discussing the facts, and after reading the indictment at length (4 R. 2743 ff.), came to the question of what evi-

* The point here presented was made in the petitions for rehearing in the Circuit Court of Appeals (8 R. 4835, 4853).

dence, short of evidence covering all allegations of the indictment, would suffice to support a conviction. The Judge said (4 R. 2759):

> "The indictment has to charge everything the Government expects to prove, or it would not be permitted to prove them, but at the same time if the Government has tried to prove something and failed to prove it the mere fact that some element or part of the scheme that the Government has alleged in the indictment could not be established beyond a reasonable doubt does not necessarily mean acquittal of all of the defendants. If enough of the claims set out in the indictment are proved beyond a reasonable doubt to amount to a scheme to defraud in the meaning of the mail fraud statute, of the sort and general nature, and substantially the same as that set out in the indictment, a conviction can be had, * * * But you must find beyond a reasonable doubt that the scheme described in the indictment is proved in all its substantial details; that at least some of the misrepresentations must be proved as charged to your satisfaction and beyond a reasonable doubt, and those proved must lay a sufficient foundation for a finding by the jury that the scheme in substance was in fact devised. * * *"

This language permitted the jury to reject as not proved some parts of the scheme alleged and some of the false representations alleged, and yet to return a verdict of guilty if satisfied that the scheme "in substance" existed, the latter phrase being undefined. The charge gave no inkling as to whether any particular thing had to be found as a prerequisite to conviction.

The jury was permitted to convict petitioners either upon a finding that there were misrepresentations with respect to the contract, or that there was a "bribe" or corruption in connection with obtaining it; and it is not possible to determine which of the alternatives the jury in fact found. Now the Circuit Court of Appeals holds that there was insufficient proof of criminal misrepresentation

—the first alternative—to warrant a conviction on that ground alone. But as the jury could have selected either alternative under the charge, it may well have based its verdict on the misrepresentation of the contract. By affirming, rather than resubmitting the case to the jury, the Circuit Court of Appeals has peremptorily *assumed* a jury finding on the second alternative, and has thus substituted itself for the jury.

The reference in the charge to the necessity for finding the scheme "in substance" does not assure that the jury found that these petitioners were criminally implicated in the "bribe"—the finding which the Circuit Court assumes was made. First, no guidance was given to the jury on the extent to which parts of the scheme and some of the misrepresentations could be rejected and the scheme be still found to exist "in substance." Certainly it is a pure guess whether the jury believed the "bribe" was vital to the scheme "in substance." Second, the Circuit Court itself says that the "principal false representation" was as to savings under the contract (8 R. 4806). The jury might have believed the same, and considered that that was the scheme "in substance." Third, the great weight of the proofs as to these petitioners was directed to the alleged distortion of the contract, probably leaving the impression with the jury that that was the scheme "in substance" as to them. (Such an impression was further fostered by another portion of the charge* which invited

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* The court said (4 R. 2755): "If you find from the evidence that the defendants or any two or more of them were with criminal intent parties or partners to the fraudulent scheme charged, then I charge you that it is the law that if anyone a party to the scheme during the existence and execution of the scheme does any act in furtherance of the scheme or in its execution his act becomes the act of all the parties in the criminal enterprise, even though they had no knowledge of what he did; and if it be true that these defendants *or more than one defendant* participated in the scheme as charged in the indictment, *then any representations made by any one of the defendants in furtherance of the scheme would be the act of all the parties.*"

a conviction of all the defendants if these petitioners were found guilty of misrepresentation of the contract and the others were found guilty of the "bribe.")

In practical effect the District Judge was charging that a conviction could be based on factor *A*, or factor *B*, or both. The Circuit Court now holds that factor *B* is indispensable to a conviction. It cannot be inferred (from the charge or from the general tenor of the trial) that the jury found factor *B*. It is thus impossible to say that there was a true jury verdict on the focal issue of criminality. That this error is particularly grievous as to these petitioners in view of the nature and quality of the evidence as to them.

In affirming the conviction upon a theory of the facts not necessarily found by the jury, the Circuit Court ran directly counter to *Nash* v. *United States*, 229 U. S. 373.

The indictment in that case charged a conspiracy to restrain and monopolize trade in certain commodities by twelve different means, each of which was described. The trial court charged the jury in words very similar to those employed by the trial court herein (*sub nom. United States* v. *American Naval Stores Co.*, 172 Fed. 455, 462):

> "It is not necessary for the government to prove that all of the means charged were in fact a part of a single purpose and conspiracy by two or more of the defendants, or that all of the means charged were in fact carried out by two or more of the defendants. It is sufficient if it be reasonably shown beyond a reasonable doubt that *some of those means charged* were a part of the common scheme or design or understanding by two or more of the defendants and that those same means were of themselves sufficient to cause an essential obstruction of the free and untrammeled flow of trade and commerce between the states and with foreign nations."

The Fifth Circuit Court of Appeals affirmed without opinion the convictions obtained on this charge (186 Fed. 489),

and denied rehearing (*id.*). This Court granted certiorari (219 U. S. 587) and reversed the judgment on the ground that some of the means were insufficient to ground a conviction and that under the charge the jury might have rested its verdict upon such means, despite the general language in the charge which required proof of "the common scheme" to restrain commerce. This Court said by Mr. Justice HOLMES (229 U. S., p. 380):

> "Thus while it may be admitted that not all the means alleged need be proved, the charge invited the jury to consider all, and permitted a verdict upon any one of them. The 5th, 6th and 8th statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important [*]. Furthermore one of the means alleged was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic it would have had a tendency to show the scheme alleged. But taken by itself, as the jury might have taken it under the instructions it showed only cheating, and could not warrant a finding of the conspiracy with which the defendants were charged. It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged, for instance, the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point."

See also *Stromberg* v. *California*, 283 U. S. 359, 368.

As the essence of a jury trial in a criminal case is that the jury must find the essential elements of the crime

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[*] This is an indication of the importance which this Court attached to the point involved. The trial judge had called attention to the abandonment of the 5th, 6th and 8th statements of means (172 Fed., pp. 461, 462) but not "in the connection in which it was important."

(*McAffee* v. *United States*, 105 F. (2d) 21 [App. D. C.]), violation of the rule of the *Nash* case is tantamount to a deprivation of the constitutional right to trial by jury. And as it is the *jury*, not the court, which must find the essential elements of the crime, the *Nash* case necessitates a resubmission to the jury even if the appellate court is of opinion that there was adequate evidence to support a conviction upon a legally tenable theory not necessarily applied by the jury to the facts. *People* v. *Moran*, 246 N. Y. 100, 105.

III. In overruling the claim that these petitioners were denied a fair trial, in a situation which it concedes to have been "extraordinary," the Circuit Court of Appeals so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; and it likewise decided Federal questions in a way probably in conflict with applicable decisions of this Court.

We have outlined above and shall not repeat here the factors of prejudice which surrounded the case and entered into the conduct of the trial. The question presented is whether, in a situation described by the Circuit Court as "indeed extraordinary" (8 R. 4808), these petitioners received a fair trial compatible with standards established by this Court.

First, the record should be viewed as a whole, for it is the multiplication and accumulation of prejudicial factors of which these petitioners especially complain. See *Berger* v. *United States*, 295 U. S. 78, 85; *Pierce* v. *United States*, 86 F. (2d) 949 (C. C. A. 6). Thus the over-zealous activities of the prosecutor might be less serious if the atmosphere had not already been charged with bias. The determination to proceed with the trial at a time strategically close to the primary election might be pardonable if the newspapers had been brought to book before the

trial commenced. And so on. There are few cases of actual prejudice which cannot be plausibly argued away by isolating each grievance and citing a convenient decision. The true question is, What was the probable cumulative effect upon the twelve human beings on the jury—an effect of which the jury cannot itself be aware? And the record must be weighed in its entirety before a proper answer can be given. We submit that the Circuit Court could not have rejected petitioners' contentions except by pulverizing the case and failing to consider it as the single drama which it was.

Second, although there is an area of discretion reserved to the trial judge in dealing with claims of prejudice, that area is not unlimited, and no appellate court is justified in canceling its own doubts (candidly expressed by the Circuit Court herein) by simply relying on the probability that the trial judge did tolerably well under trying circumstances. Such an attitude is particularly unjustified where the record is as complete as it is in the case at bar. We submit that the result reached below is due to a disinclination on the part of the Circuit Court to deal with the raw facts which are fully spread on this record. This Court, at any rate, has committed itself to a larger duty in reviewing claims of prejudice. See *New York C. R. Co.* v. *Johnson*, 279 U. S. 310; *Berger* v. *United States*, *supra*.

Third, it is not enough to consider whether the trial as enacted preserved the *minimal* decencies (although we think those also were denied); it is pertinent to inquire whether these petitioners received *as fair a trial as could have been accorded them;* if they did not, we think a *prima facie* case is made out for a new trial. And in this connection the social cost of taking any given step to purge the trial from suspicion of prejudice is to be weighed against the consequences of not taking it. Consider, for example, the Circuit Court's concession that "The trial might very well have been postponed" (8 R. 4808).

Why was it not postponed? The court suggests that "The courts cannot suspend because an election is on and because the cases to be tried may [*sic*] have a political significance" (8 R. 4808). But a continuance of this case (no other case was in question) for six weeks from December 4, 1939, would hardly have amounted to a "suspension" of the courts. The granting of a continuance could not have hurt the legitimate interests of the Government; denial of a continuance certainly created a grave risk of prejudice to the accused. We submit that here, as in other connections, less was done than could easily have been done to eliminate an obvious peril to the fair conduct of the case.

Fourth, the duty of the prosecuting officer is not properly conceived as that of hewing as closely as possible to the line of reversible error in each of his unprovoked sallies on the accused; it is rather the duty of doing affirmatively the most that lies within his power to insure a fair trial. "We think," says the Circuit Court, "that the prosecuting attorney's encouragement of the newspaper publicity about the case was ill-judged, and improper." Again, "The newspapers here sometimes went too far, and the prosecuting attorney ought not to have contributed to what became an abuse" (8 R. 4808). This is to be put by the side of a recent extra-judicial statement of a member of this Court which defines the proper role of the prosecutor: "* * * he who wields the instruments of criminal justice wields the most terrible instruments of government. In order to assure their just and compassionate use, a prosecutor must have an almost priest-like attitude toward his duties."

Fifth, it has already been shown that the claimed prejudice, if it existed, cannot be regarded as harmless at least as to these petitioners, and it has also been observed that these petitioners did not by any act of their own cast themselves into the political arena in which their case was, as we submit, actually tried and decided.

As to the conduct of the court and the prosecutor up to the date of the trial, the standard of duty is indicated in *United States* v. *Sullens,* 36 F. (2d) 230 (S. D. Miss.), where, after the appearance of one severely prejudicial newspaper article circulated in the community, the prosecutor voluntarily moved to quash the *venire* and continue the case, and forthwith lodged an information to punish the editor for contempt (p. 231). In the case at bar, in the course of one of the most heated political campaigns in the history of the State of Louisiana, with "convict parades" the order of the day, the prosecutor saw fit to promote publicity far more hurtful than that in the *Sullens* case, to precipitate the trial when public excitement was at its peak, and to resist the efforts of the accused to secure a reasonable continuance. And the District Court not only remained supine despite the several requests for corrective action but, as we submit, implicitly aggravated the prejudice.

We do not suggest that a court can or should command the press and public processes to stand still simply because there is a case to be tried, nor can the court cease altogether to function in a time of excitement—in a sense this would be a surrender to the mob. But these alternatives, inferentially put forward by the Circuit Court, hardly exhausted the possibilities of corrective action. Measures short of either extreme would have sufficed in the case at bar. They were not taken.

When finally the court was faced with prejudicial abuse of the defendants during the course of the trial, he ordered contempt proceedings—on the theory that the matter had a tendency to prejudice the jury; but he denied motions for a mistrial—on the theory that the matter had not in fact been seen by the jury. When the case is viewed against its whole background of passion, this assumption concerning the hermetical indifference of the jury (which was not locked up) to influences undoubtedly at work on all other members of the community, appears to be no more

than a polite fiction. A more realistic court has said in a similar situation: "It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it. Good ground, therefore, here appears for setting aside the verdict." *Meyer* v. *Cadwalader,* 49 Fed. 32, 36 (C. C. Pa.). Accord: *Griffin* v. *United States,* 295 Fed. 437 (C. C. A. 3).

In *Mattox* v. *United States,* 146 U. S. 140, a single prejudicial newspaper article read by the jury was held to void the verdict. Here it is virtually conceded that had either of two newspaper headlines (of the scores of prejudicial ones published) been seen by the jurors, a mistrial should have been ordered, for upon those two stories the newspapers were in fact punished for contempt. It seems to us absurd to imagine that the influences actually at work in the minds of the jurors during the course of the trial were less obnoxious to the conduct of a fair trial than those against which the court fended in the proceedings for contempt.

But if the case stood only on the prosecutor's summation (which the Circuit Court discusses only in vague terms), clearly a question is presented whether reversible error was not committed. The prosecutor's heated statement of personal belief in the guilt of all the accused, with the court emphasizing the fact that it was not an ordinary United States Attorney that held this opinion, but an Assistant Attorney General of the United States, plainly

falls within the strictures of Mr. Justice ROBERTS, dissenting in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 264 (decided after the trial herein):

> "One of the most reprehensible things a prosecutor can do is to attempt to put into evidence before the jury his own, and his colleagues', opinion as to the guilt of the defendants he is prosecuting. Such a practice brings before the jury the unsworn testimony of a sworn officer of the Government. This fact lends it undue and improper weight and injects an element into the case which is so insidious and so impossible to counteract that trial judges, in my experience, have never hesitated to withdraw a juror and declare a mistrial because of this violation of the canons."

We do not understand that the majority of the Court disagreed with Mr. Justice ROBERTS in this portion of his dissent; the majority excused the prejudice by reference to other factors which do not exist herein.

Again, the prosecutor in his summation stated as a fact that these petitioners were implicated in a transaction with which concededly they had nothing to do, and which, had it been proved against them by legal evidence, might well have furnished ground for a verdict of guilty. We refer to the "O'Neil transaction." This hurtful distortion of the evidence, specifically directed to these petitioners, had the effect, whether by design or otherwise, of supplying the very link in the proofs which the Circuit Court has held to be focal to the conviction—the alleged complicity in the "bribe" to Waguespack. This Court has held, in cases less aggravated than that at bar, that distortion of evidence in summation—and particularly by a prosecuting officer—was reversible error. *Waldron* v. *Waldron*, 156 U. S. 361; *New York C. R. Co.* v. *Johnson, supra; Taliaferro* v. *United States*, 47 F. (2d) 699 (C. C. A. 9); *Minker* v. *United States*, 85 F. (2d) 425 (C. C. A. 3); *cf. United States* v. *Socony-Vacuum Oil Co., supra; Turk* v. *United States*, 20 F. (2d) 129 (C. C. A. 8).

IV. In overruling the claim that certain documents, obtained as the result of an unlawful and unconstitutional search and seizure, were improperly received in evidence against these petitioners, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has rendered a decision in conflict with the decision of another Circuit Court of Appeals.

On August 23, 1939—two days after the handing down of an indictment by the Federal Grand Jury against these petitioners, which was subsequently superseded by an indictment adding more counts—the State authorities raided the premises of Newman, Harris & Co. and seized and removed literally hundreds of papers of the firm (see inventory, 4 R. 3014-28). Nineteen documents obtained by means of this raid were offered by the prosecution at the trial herein and were received in evidence over objection (2 R. 1085). Petitioners assigned error to this ruling (8 R. 4666). Examination of the documents will show that they were material to petitioners' conviction (see 8 R. 4666-8).

The sole basis of the search warrant was an affidavit of the District Attorney of New Orleans Parish (Ex. G-26-A, 4 R. 3011-2) sworn to the day after the Federal indictment was handed down. It contained no statement of fact beyond the assertion that a mass of unspecified documents were on the premises of Newman, Harris & Co.

The search warrant, signed the same day by the judge of a local criminal court (Ex. G-26-B, 4 R. 3012-3), simply repeated the language of the affidavit. Nor could the District Attorney suggest any legal basis for the warrant when he testified at the trial herein. He said that "a certain amount of suspicion attached to it [the refunding transaction] which I think justified the District Attorney's office in going into it" (2 R. 1088). He admitted that the warrant was "partly based on suspicion" (*id.*), and mentioned no other basis. As to the purpose of the search,

the District Attorney referred to certain affidavits filed in the State court by two of his assistants, also on August 22, 1939, charging bribery (Exs. G-26-E, F, 5 R. 3029-31), and stated that he had secured the warrant "in order to obtain what I consider to be necessary evidence in connection with the trial of the case" (2 R. 1088). No State trial ever took place.*

That the Federal authorities were closely connected with the unlawful search is manifest from the record, and that they knowingly took the fruits of it is undisputed. The coincidence in dates between the Federal indictment and the State raid is in itself illuminating. Mr. Talbot, attorney for the petitioners below, testified that when he accompanied the State officials back to their office after the raid one of the United States Attorneys was there (2 R. 1103); that gentleman did not remember (2 R. 1099). When asked whether he had not been "exchanging information right along down the line between the United States Attorney's office and your office," the local District Attorney replied that "we had been exchanging information," that he had "been in cooperation on the case" with the Federal prosecutor, and that "in other words, we turned over any records we had to the [Federal] government that the government wanted to inspect" (2 R. 1089). The State officers informed the Federal prosecutor of the results of the search because "we believed the evidence we found would assist them in the preparation of the case today" (2 R. 1098). The seized documents were produced by the State authorities at the trial herein without subpoena (2 R. 1066).

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* The Circuit Court states that "It does not appear that any action has been taken by Newman & Harris to vacate the search warrant or recover the papers" (8 R. 4811). This is erroneous. A motion was made in the State court to vacate and set aside the warrant, which was pending at the time of the trial herein (2 R. 1090) and has never been decided.

The Circuit Court of Appeals does not declare whether the search was itself unconstitutional under Federal law (the State law is parallel). We submit that it was.

(a) Under applicable decisions of this Court, the dragnet warrant herein was fatally defective for want of particularity.

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."
>
> *Marron* v. *United States*, 275 U. S. 192, 196.

(b) Under applicable decisions of this Court, the warrant was invalid as having issued without "probable cause." Indeed the only affirmance of belief was that the documents were at a certain place, and the search proceeded on the basis of "suspicion."

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles* v. *United States* (C. C. A. 1st), 284 Fed. 208; *Wagner* v. *United States* (C. C. A. 8th), 8 F. (2d) 581); and would lead a man of prudence and caution to believe that the offense has been committed."
>
> *Grau* v. *United States*, 287 U. S. 124, 128.

(c) Under applicable decisions of this Court, the warrant was invalid in purpose. The only purpose suggested was to obtain documents for use as evidence of crime of which petitioners were accused or suspected.

> "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States*, 255 U. S. 298, 310."
>
> *United States* v. *Lefkowitz*, 285 U. S. 452, 464-5.

Assuming *arguendo* that the search was invalid under Federal law, the Circuit Court of Appeals thought that the essential question "turns on whether the federal officers were *party* to the seizure" (8 R. 4810). It then conceded that "there had previously been an *exchange of information* between the two groups of officers and *cooperation* in that way" (8 R. 4811). But it overruled the claim of constitutional right on the ground that "the federal officers had nothing at all to do with the *State's proceedings* for the search" (8 R. 4811). It is, then, the precise holding of the court that the products of an unlawful search by State officials may knowingly be used by the Federal prosecutor in a Federal trial, even though the State and Federal officials have been continuously "cooperating" and "exchanging information" about the very case in connection with which the search is made, provided only the Federal officials do not themselves participate in the State's proceedings for the search. We submit that in so holding the Circuit Court misconstrued the applicable decisions of this Court and took a position at variance with that assumed by the Fourth Circuit Court of Appeals in *Sutherland* v. *United States*, 92 F. (2d) 305.

In *Gambino* v. *United States*, 275 U. S. 310, the Federal officers did not participate in the State's proceedings for the search, yet this Court expressly held that *"Evidence obtained through wrongful search and seizure by state officers who are cooperating with Federal officials must be excluded"* (p. 314). The Court went on to declare the applicable rule as to prohibited cooperation in terms which expose the fallacy of the Circuit Court herein (pp. 316-7):

> "* * * It is true that the troopers were not shown to have acted under the directions of the Federal officials in making the arrest and seizure. But the rights guaranteed by the 4th and 5th Amendments may be invaded as effectively by such co-operation, as by the state officers acting under direction of the Federal officials. Compare *Silverthorn* v. *United States*, 251

U. S. 385, 392. The prosecution thereupon instituted by the Federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States. * * *"

See also, *Byars* v. *United States*, 273 U. S. 28, 34.

Moreover, factitious distinctions which may be suggested between the *Gambino* case and the instant case have been rejected by the Fourth Circuit Court of Appeals in *Sutherland* v. *United States, supra.* It is true that in the *Gambino* case the search was made "solely for the purpose of aiding the United States in the enforcement of its laws" (275 U. S., p. 317), while here the search might conceivably also have aided the State in the enforcement of its laws. But this, in the view of the Fourth Circuit, is immaterial. Again, attempted distinction on the ground of difference of *degree* of cooperation between State and Federal officers is blasted by a consideration of the facts before the Fourth Circuit, which certainly revealed no greater degree of cooperation than in the instant case.* The court said in the *Sutherland* case (92 F. [2d], pp. 307-8):

"* * * But we think that, where the state and federal officers have an understanding that the latter may prosecute in the federal courts offenses which the former discover in the course of their operations, and

* The Stipulation of Facts in the *Sutherland* case recites that "there were no federal officers present or participating in the search"; that after the search, the State "officers participating in the search discussed among themselves the advisability of turning the case over to the federal authorities"; that the Federal officer who utilized the fruits of the search "did not know of the search until the State officers consulted him with reference to adopting the case, and that he had not suggested or instigated the search"; and that "the State officers generally understood that when they have made a seizure of illicit liquor they are at liberty to consult with the federal officers with a view to determining whether or not the federal officers adopt the case and institute a federal prosecution against the particular offender; that they frequently do pursue this course and that frequently such cases are adopted" (Record on Appeal, pp. 7, 8).

where the federal officers adopt a prosecution originated by state officers as the result of a search made by them, the same rule as to the admissibility of evidence obtained in the course of the search should be applied as if it were made by the federal officers themselves or under their direction. Gambino *v.* United States, 275 U. S. 310, * * *. It is true that in the Gambino Case it is stated that the 'wrongful arrest, search, and seizure were made solely on behalf of the United States'; but we do not think that this is sufficient to distinguish that case from this, where there was general co-operation between state and federal officers and where the federal officers in fact adopted the prosecution which the state officers had begun as a result of their search. It is the fact that there was such co-operation and adoption and not the fact that the search was made solely in behalf of the United States which in our opinion is the determining factor; for, whether the arrest, search, and seizure be made solely on behalf of the United States or not, it remains true that 'the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation as by the state officers acting under direction of the federal officials.' "

If, as we contend, the present case is governed by the *Gambino* case, the court below ran counter to applicable decisions of this Court; in any event the decision below conflicts with the *Sutherland* case, creating a division of the Circuits on a question that is important and worthy of review.

Conclusion

For the foregoing reasons, your petitioners, by their solicitors, respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to the end that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 911.

NORVIN T. HARRIS, JR.,
Petitioner,

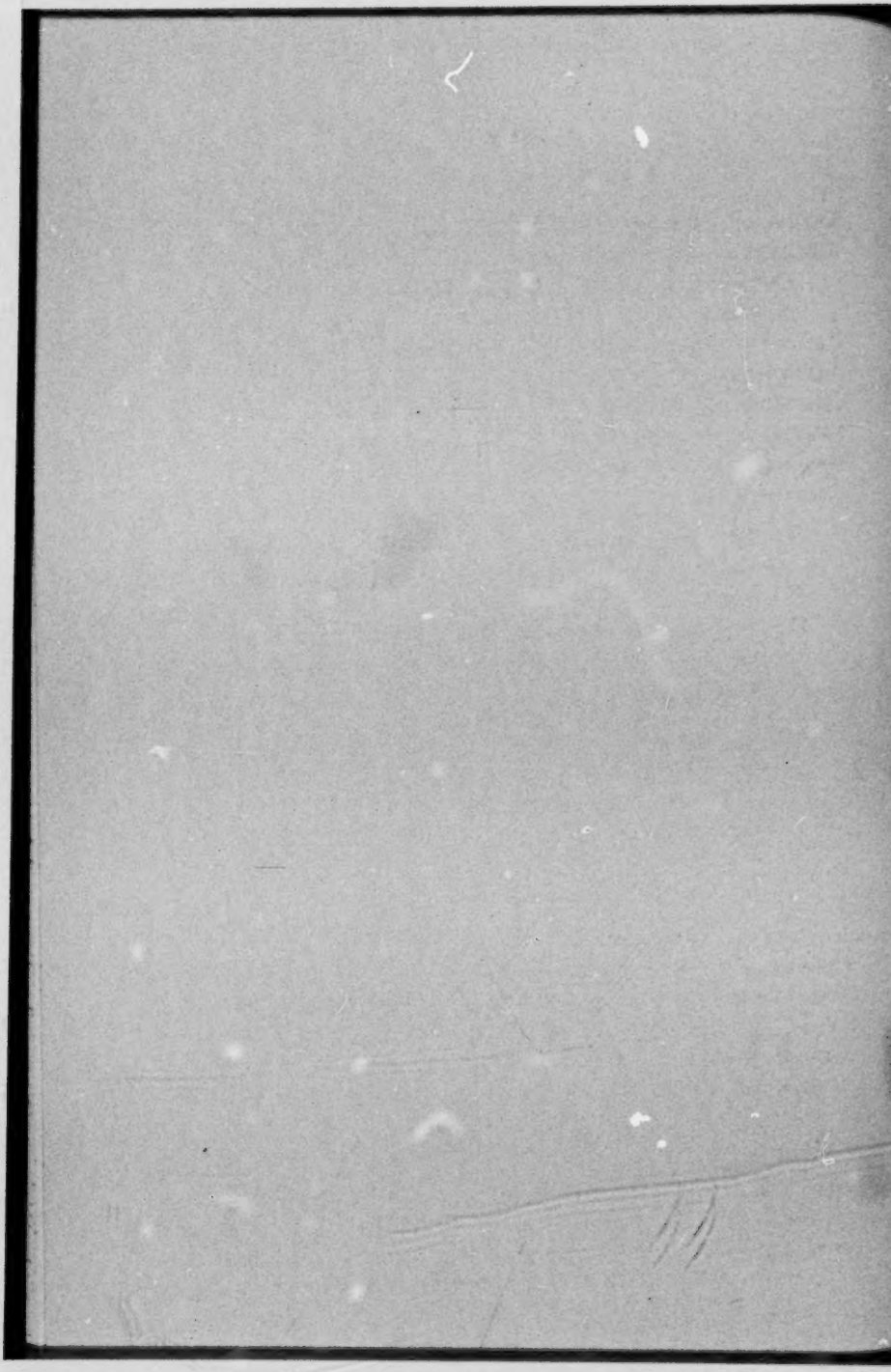
vs.

UNITED STATES OF AMERICA,
Respondent.

ADDITIONAL AND SUPPLEMENTAL PETITION OF NORVIN T. HARRIS, JR., FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND NOTICE OF MOTION FOR LEAVE TO FILE.

DAVID V. CAHILL,
Solicitor for Petitioner.

SUPREME PRINTING COMPANY, LAW PRINTERS, BARCLAY 7-0349



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